

Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

Docket No. 16-CRB-0009-CD (2014-2017)

**SETTLING DEVOTIONAL CLAIMANTS' REPLY TO PUBLIC TELEVISION'S
RESPONSE TO JSC'S REVISED PRIVILEGE LOG AND PRODUCTION**

The Settling Devotional Claimants ("SDC") respond to the extremely misleading implication in footnote 1 of PTV's response to JSC's revised privilege log, in which PTV claims:

In particular, the only party that contended at the outset of this proceeding that such broad discovery is appropriate—the Settling Devotional Claimants ("SDC")—did not file a motion to compel the same scope of discovery in connection with Dr. Tyler's regression analysis, offered by the Program Suppliers. Not coincidentally, as SDC has acknowledged, Dr. Tyler's regression analysis would provide SDC with a share nearly as high as the Bortz survey methodology. As a result, the parties and the Judges lack any ability to assess comparable evidence regarding whether or not Dr. Tyler conducted a "model search," among other things.

PTV Response at 2 n. 1.

First, the SDC have never contended that a party may not withhold materials protected by the work product doctrine, and the Judges specifically permitted PTV to do so. PTV has withheld or redacted many dozens of documents, a substantial number of which appear to be drafts of Dr. Johnson's testimony. *See* Ex. 5004, PTV Privilege Log. The SDC have not challenged PTV's assertions of privilege and work product.

Second, the SDC did not move to compel Program Suppliers (Dr. Tyler), CCG (Dr. George), or CTV (Dr. Marx) to produce information about alternative regression models that were run *because all three of these parties produced their alternative models voluntarily in*

response to the SDC's document production requests, which were substantially identical to the requests the SDC served on PTV. The SDC's counsel communicated with counsel for each of the other parties after receiving document productions. Counsel for Program Suppliers, CCG, and CTV each confirmed unequivocally that all alternative regression models had been produced. As the Judges noted in their Order 24, granting the SDC's motion to compel against PTV, "PTV's claim of burden is belied by the fact that 'all other parties presenting regression methodologies in these proceedings were able to produce an organized set of documents that showed results and allowed for the replication and verification of alternative models considered, without producing email correspondence among their experts.'" Order 24 at 14 (quoting SDC Reply at 4).

Program Suppliers, CCG, and CTV all produced one or more alternative models that were tested (with Program Suppliers producing 32 model runs, including runs in which one specification was tried on two or more datasets). PTV is the only party that produced none. Counsel for Program Suppliers, CCG, and CTV all confirmed, without qualification, that all alternative models had been provided. Only PTV's counsel equivocated, claiming in carefully worded responses only that PTV had provided specifications and results "reviewed or considered by Dr. Johnson" (which would mean he saw nothing but what was dropped into his report, contrary to his later testimony), and refusing to engage with requests to confirm that PTV's production included specifications and results that were reviewed by Dr. Johnson's team, if not by Dr. Johnson himself. In matters of discovery, the SDC's counsel have no choice but to trust in the good faith of counsel for other parties, including assurances as to whether responsive documents have been provided. PTV's counsel's refusal to provide such assurances (even while not explicitly acknowledging that responsive documents were being withheld) bolstered the

SDC's suspicions (later proven correct) that a model search had taken place. PTV's responses also engendered the SDC's suspicions (also proven correct) that Dr. Johnson was shielded deliberately from the model search.

Later, after the SDC filed their motion to compel on August 19, 2022, PTV's counsel acknowledged for the first time on August 29, 2022, that PTV was withholding the results of hundreds of alternative models considered. *See* SDC's Supplemental Brief in Support of Motion to Compel (Sep. 15, 2022), Declaration of Matthew J. MacLean ¶¶ 2-7. Even then, the SDC expressed willingness to accept something less than a full production, provided only that PTV would provide all results, code files, date information, and regression datasets. *Id.* ¶ 10. But PTV's counsel responded that not all results and metadata had been retained, and they refused to produce even the information that they had, forcing the SDC to pursue such substitute information that may be found in notes and emails. *Id.* ¶¶ 10-11 and exhibits cited.

Discovery motions are expensive and contentious, and they are frequently unproductive. To be clear, the SDC strongly presume that opposing counsel provide truthful information, and the SDC do not pursue discovery motions except when they believe that something highly material has been withheld.

If the SDC believed that Program Suppliers, CCG, or CTV had withheld alternative models tried, the SDC most certainly would have moved to compel. If it ever turns out that any party provided inaccurate or incomplete information, nobody will be more interested to learn that than the SDC. But it was only PTV – through squirrely and equivocal responses – that gave us cause to believe that we were not receiving a complete production or the whole truth.

It is not “coincidental” that we found a model search where we suspected we would find it. Dr. Crawford taught us what the fingerprints look like, and Dr. Johnson left them all over.

Date: April 11, 2023

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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Proof of Delivery

I hereby certify that on Tuesday, April 11, 2023, I provided a true and correct copy of the Settling Devotional Claimants' Reply to Public Television's Response to JSC's Revised Privilege Log and Production to the following:

SESAC Performing Rights, LLC, represented by Timothy L Warnock, served via E-Service at twarnock@loeb.com

Public Television Claimants, represented by Ronald G. Dove Jr., served via E-Service at rdove@cov.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman, served via E-Service at ted@copyrightroyalties.com

Program Suppliers, represented by Lucy H Plovnick, served via E-Service at lh@msk.com

Joint Sports Claimants, represented by Michael E Kientzle, served via E-Service at michael.kientzle@arnoldporter.com

National Public Radio, represented by Gregory A Lewis, served via E-Service at glewis@npr.org

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss, served via E-Service at jennifer.criss@dbr.com

Global Music Rights, LLC, represented by Scott A Zebrak, served via E-Service at scott@oandzlaw.com

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ASCAP, represented by Sam Mosenkis, served via E-Service at smosenkis@ascap.com

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Signed: /s/ Matthew J MacLean